

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 5-2012

12
13 DETENTION OFFICERS ASSOCIATION)
14 OF MISSOULA COUNTY,)
15 Complainant,)
16 -vs-)
17)
18 MISSOULA COUNTY,)
19 Defendant.)
20)
21)

INVESTIGATIVE REPORT
AND
NOTICE OF INTENT TO DISMISS

22 **I. Introduction and Background**

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24 On August 23, 2011, the Detention Officers Association of Missoula County, hereinafter
25 DOAMC or Association, through Martin Elison, attorney at law, of Missoula, Montana,
26 filed an unfair labor practice charge with the Board of Personnel Appeals (Board)
27 alleging that Missoula County, hereinafter County, violated Section 39-31-401(3), MCA,
28 as well as Section 39-31-401(5), MCA, by discriminating in regard to hiring association
29 members and by refusing to bargain collectively in good faith. On September 6, 2011,
30 the County responded to the original charge through its Chief Operating Officer, Steve
31 Johnson and denied any violation of Montana law. The County further contended that
32 the original complaint did not comport with ARM 24.26.680(3) and, further, that major
33 portions of the complaint concerned issues not subject to jurisdiction of the Board of
34 Personnel Appeals.
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37 On September 12, 2011, the DOAMC filed an amendment to its original complaint. The
38 amendment was filed for the dual purposes of clarification of the initial complaint as well
39 as to add relevant facts not contained in the initial complaint. The amended complaint
40 was served by the Board on September 12, 2011. On September 19, 2011, Steve
41 Johnson responded on behalf of the County denying that any unfair labor practices had
42 been committed, again asserting the complaint did not comport with ARM 24.26.680(3),
43 and contained many allegations not subject to Board jurisdiction. The County filed a
44 supplement to the amended complaint on September 19, 2011.
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47 John Andrew was assigned by the Board to investigate the charge and in the course of
48 investigating the charge sent Mr. Elison a series of questions concerning the complaint
49 and amended complaint.
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1 On October 11, 2011, DOAMC filed a Motion to Remove Steve Johnson as
2 Representative for Defendant and Brief. On October 19, 2011, Michael Dahlem,
3 attorney at law, appeared on behalf of the County and filed a motion objecting to the
4 motion filed by the DOAMC. On October 25, 2011, the Board issued an Order
5 essentially explaining Board process and denying the DOAMC motion as premature in
6 nature. No appeal was taken by DOAMC.
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9 After a series of extensions, on November 30, 2011, DOAMC responded to the
10 questions asked by the investigator. On December 19, 2011, the County filed a Motion
11 to Dismiss, again citing procedural defects in the complaint and amended complaint.
12 On January 23, 2012, and upon request of the investigator, the DOAMC filed a
13 Response to Defendant's Motion to Dismiss and Motion to Amend Complaint. The
14 DOAMC then filed a second amended complaint, on February 2, 2012, the purpose of
15 which was to "drop 90% of the claims in the first complaints and create a much more
16 concise picture of events that we claim to be unfair labor practices." The second
17 amended complaint goes on to assert that it should make the issues for which
18 investigation is needed "less complicated" as they are focused on:
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- 20 a. Unfair labor practices used to force the execution of an Agreement; and
- 21 b. Breach of contract by amending job descriptions beyond the scope of the
- 22 Agreement; and
- 23 c. Under-staffing and lack of supervisor staff in breach of agreements.
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26 The County responded to the second amended complaint on February 6, 2012, again
27 denying that it committed any unfair labor practice and raising similar defenses as
28 offered in previous answers.
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30 **II. Findings and Discussion**

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32 The initial charge of the DOAMC is that "Missoula County has violated both Section 39-
33 31-401(3), MCA in regard to hiring of association members and Section 39-31-401(5),
34 MCA in refusing to bargain collectively in good faith." The charge further alleges that
35 the County violated the public policy considerations of Section 39-31-101, MCA. Then,
36 in what is most puzzling to the investigator, the charge goes on to state:
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39 "Violations of these statutes and policies of the State of Montana is exceptionally
40 unfair where the detention officers are essential personnel prevented by strike,
41 picket or other restriction of work such that they have no recourse when the
42 County of Missoula fails to deal with them in good faith."
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44 The charge concludes with the equally puzzling statement that:
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47 "Finally, Missoula County has no motivation to deal in good faith with the
48 Detention Officers' Association of Missoula County because in the event of an
49 impasse on contract terms the court simply implements the contract as it was
50 previously drafted."

1 The above statements go to the question of bad faith bargaining in the context of
2 negotiating a successor contract, a continuing theme of DOAMC through all its charges
3 and amended charges, and if shown, do form the basis of an unfair labor practice
4 allegation. The issue of refusal to proceed to arbitration of a grievance is also a
5 question of bad faith, to be addressed later, but it too does constitute an allegation
6 which, if shown, constitutes an unfair labor practice. For now, in terms of negotiations,
7 on April 12, 2011, the County and DOAMC entered into a bargaining agreement the
8 terms of which run from July 1, 2010 through June 30, 2012. Thus the previous
9 agreement expired on June 30, 2010. That agreement, as well as the extant
10 agreement, provides:

11 12 ARTICLE 7: NO STRIKE / NO LOCKOUT 13

14 The ASSOCIATION agrees to the essential nature of the services provided by its members in
15 protecting the public welfare. In recognition of this fact, the ASSOCIATION agrees that neither it nor
16 its members individually or collectively will cause, authorize, permit, approve, engage or take part in
17 any strike, picketing, sit-down, stand-in, slowdown, or any other curtailment or restriction or
18 interference with work on or about the EMPLOYER'S business. In the event of unauthorized
19 interruptions, the ASSOCIATION agrees that it will join the EMPLOYER in requiring its members to
20 return to work immediately. The EMPLOYER agrees that there shall be no lockout of bargaining unit
21 employees.
22

23 To the extent that the DOAMC could not engage in certain activities while the contract
24 was in full force and effect, it is correct that the options open to the Association were
25 somewhat limited during the term of the agreement. However, from at least July 1,
26 2010, until a new agreement was signed, nothing prevented the Association from
27 engaging in protected, concerted activities, including legal strikes and picketing. Of
28 particular note, if DOAMC were of the understanding, as it seemed to be, that there was
29 some statutory provision barring a strike by law enforcement, that should be put to rest,
30 as the no strike, no lockout provisions of Montana law pertain to city police departments,
31 not detention personnel in a county sheriff department. It is noted, however, that the
32 County and the Sheriff's Association do have no strike, no lockout provisions as well as
33 interest arbitration as the chosen method to resolve contract language issues, but that
34 contract is not applicable to detention personnel.
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37 Concerning the issue of impasse, it is fundamental in law that upon declaring impasse
38 an employer can implement last, best and final offers, sometimes on an issue by issue
39 basis and sometimes as a package. However, Missoula County never declared
40 impasse. The County did not have to as on April 11, 2011, the DOAMC and the County
41 signed off on a new bargaining agreement. Prior to this happening, nothing would have
42 prevented the DOAMC from, for instance, engaging in concerted activities, requesting
43 mediation assistance, or for that matter filing a timely unfair labor practice charge
44 alleging bad faith bargaining. As it were, the Association did none of the above. Now,
45 making their argument that what happened so long ago – often well in excess of the
46 statutory timeframe for filing charges – somehow is the basis for some sort of ongoing
47 pattern of bad faith bargaining is simply untenable. The County may well have
48 bargained hard, and may not have made concessions requested by DOAMC, but
49 nothing presented by the DOAMC shows that the County failed to consider proposals,
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1 failed to meet at appropriate times, failed to make counter offers, or in any manner
2 engaged in a totality of conduct demonstrating bad faith. In fact, nothing offered by
3 DOAMC demonstrates that the County did anything other than maintain the status quo
4 on mandatory subjects throughout the course of bargaining.
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6 The above leads to the allegation that the County refused to proceed to arbitration on a
7 grievance. The processing of grievances is part of the obligation to bargain in good
8 faith and a failure to process a grievance can be an unfair labor practice. As previously
9 stated, this is one area where DOAMC has made an allegation, which if proven, could
10 constitute an unfair labor practice. However, unless the grievance can be said to have
11 arisen under the collective bargaining agreement, upon its expiration an employer is not
12 under an obligation to process the grievance to arbitration. See, for instance, *Litton*
13 *Financial Printing Division v. National Labor Relations Board*, 111 S. Ct. 2215 (1991).
14 Here, the hiring decision at the root of this charge, and thus at the root of the bad faith
15 allegations, was effective February 6, 2011. Under any version of the facts, the
16 bargaining agreement was expired at this point in time, thus severely bringing the
17 charge in doubt. In other words, the County has processed the grievance, it just
18 recognized that taking the matter to arbitration was something not required as a matter
19 of law. But, even with that said, it is clear that on April 14, 2011, Mr. Johnson in an e-
20 mail to Katie Olson, an attorney representing the DOAMC, offered to put the question of
21 arbitrability, as well as the merits of the grievance, before an arbitrator. Granted, a new
22 agreement was in place by this time, but nonetheless, the County offered a solution to
23 the deadlock. The Association seemingly never responded to this offer, but apparently
24 filed the unfair labor practice charge instead; although, at this point, seemingly, this
25 grievance is not an issue given the way this complaint has evolved.
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29 Perhaps best summing up the allegation of bad faith is one response of DOAMC. The
30 investigator asked, "Did the County ever refuse to bargain over subjects proposed by
31 the Association? What, when, and why?" The answer: "Yes." Throughout all of this
32 proceeding the Association has made numerous allegations that were just that –
33 allegations. Other than the ones discussed above, the allegations made by DOAMC
34 have no demonstrated nexus to the bargaining relationship in order to form the basis of
35 an unfair labor practice. Allegations relating to such things as safety, nepotism, failure
36 to follow policies, free speech denial (and this allegation is not shown to relate to
37 protected activities) etc. are issues not properly before the Board of Personnel Appeals
38 as there is no demonstrated link between any of these allegations and the good faith
39 bargaining obligation. These allegations need to be brought to the appropriate authority
40 charged with their enforcement, and that is not the Board of Personnel Appeals.
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43 Beyond the allegations not subject to Board jurisdiction, many of the other allegations
44 are rooted in the collective bargaining agreement. The second amended complaint just
45 affirms this all the more. Contract interpretation is not what the Board does. If there are
46 alleged "breaches" of the contract remedied by interpreting the contract, such as
47 "Amending job description[s] beyond the scope of Agreement," that is for the grievance
48 procedure and an arbitrator to decide, not the Board. In that regard, there is nothing to
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1 even remotely indicate any failure on the part of the County to process grievances in the
2 past, or prospectively.
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4 Given all of the above, it is the opinion of the investigator that the DOAMC has failed to
5 provide substantial evidence necessary for a finding of probable merit.
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7 **III. Recommended Order**
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10 It is hereby recommended that Unfair Labor Practice Charge 5-2012 be dismissed as
11 without merit.
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13 DATED this 28th day of March 2012.
14

15
16 BOARD OF PERSONNEL APPEALS
17

18
19 By: _____
20 John Andrew
21 Investigator
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23

24 NOTICE
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26 Pursuant to 39-31-405 (2), MCA, if a finding of no probable merit is made by an agent of
27 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
28 may be appealed to the Board. The appeal must be in writing and must be made within
29 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
30 Board at P.O. 201503, Helena, MT 59620-1503. If an appeal is not filed the decision to
31 dismiss becomes a final order of the Board.
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CERTIFICATE OF MAILING

I, _____, do hereby certify that a true and correct copy
of this document was mailed to the following on the _____ day of _____
2012, postage paid and addressed as follows:

MARTIN ELISON
ATTORNEY AT LAW
PO BOX 5496
MISSOULA MT 59806

STEVE JOHNSON
MISSOULA COUNTY
200 WEST BROADWAY
MISSOULA MT 59802

MICHAEL DAHLEM
ATTORNEY AT LAW
6009 WENGEN PLACE UNIT B
WHITEFISH MT 59937